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TITLE: SPRAY LIABILITY

SPRAY LIABILITY

Farmers have been spraying their crops with various chemicals routinely for many years. Chemicals are applied by farmers, their employees or by hired custom applicators with airplanes and ground sprayers. The increased use of pesticides, herbicides, fungicides, foliar fertilizers and other chemicals has created public concern and has also raised an important and unfortunately often overlooked issue for farmers; who can be held liable for accidents?

It is clear that farmers, applicators or both can lawfully be held responsible for injury to individuals and damage to animals, crops and bees resulting from the improper use of chemicals.

CUSTOM APPLICATORS (INDEPENDENT CONTRACTORS) VS. EMPLOYEES

The general rule is that the employer of an independent contractor is not liable for harm to persons or property caused by the independent contractor's negligence in the performance of delegated work.^{1/} An independent contractor must be distinguished from an employee. Unlike the situation involving an independent contractor an employer is almost always liable for the wrongful acts of an employee; this is because the employer has the right to control an employee in all aspects of the work performed.

An independent contractor, however, agrees to do a job according to his own methods and in furtherance of his own enterprise. The employer has little right to control the manner in which the work is to be done by the contractor; the contractor follows the employer's wishes only as to the end result of the work, not the means whereby it is accomplished. Thus, the independent

contractor is the proper party to be charged with the responsibility of preventing risk of harm and damages. A custom spray applicator is usually considered to be an independent contractor, and the courts have determined that a custom applicator is in fact an independent contractor.

AERIAL SPRAYING

An exception to the general rule of absolving the employer from liability for damages caused by an independent contractor is when the work performed is considered to be abnormally or inherently dangerous.^{2/} An activity is inherently dangerous when it is probable or likely that injurious consequences will result from doing the work so as to require special precautions to prevent injury. A commonly cited example of an inherently dangerous activity is blasting with explosives.

In nearly all states which have considered the issue, the courts have found aerial spraying to be an abnormally dangerous activity. Thus, farmers have been held liable for damages caused by a hired custom applicator.^{3/}

In some cases the farmer-owner and the custom applicator have been held jointly and strictly liable. One court stated that such liability could not be avoided regardless of the degree of care exercised since the activity was extra hazardous and the harm was foreseeable.^{4/}

The usual standard applied by the courts to determine liability in these cases is ordinary negligence, which means failure to exercise the care of an ordinarily prudent person in the same

^{2/} Restatement (second) of Torts 22 427, Vol. 2 (1965).

^{3/} Burroughs v. Joiner, 337 So. 2d 340 (1976).

^{4/} Loe v. Lenhardt, 362 P. 2d 312 (1961).

^{1/} Burroughs v. Joiner, 337 So. 2d 340 (1976).

situation. If this standard is applied, one must be found negligent before he will be required to pay for damages or injuries. Some courts, however, have used the standard of strict liability (liability without fault) which subjects one to liability even though all possible care was exercised in performing the work. The standard of strict liability arose in chemical spraying cases when DDT and 2-4,D came into use causing public concern and creating media attention.

Gotreux v. Gary, 94 S. 2d 293 is a leading strict liability case from Louisiana involving aerial spraying. The court held that negligence was not a requisite to liability and said, "use your own property that you don't injure land of another." This is a harsh standard and leaves the farmer without a valid defense. One rationale for strict liability is that the farmer should have foreseen that chemicals would drift onto adjoining land and cause damage.^{5/} Liability has also been based on unintentional trespass and nuisance theories.^{6/}

In contrast to strict liability, many courts have required actual proof of the applicator's negligence such as: spraying on a windy day, faulty nozzle adjustment; or improper mix, selection or application of chemicals. An important factor in establishing liability is the type, potency and drift hazard of the chemical being used. For example, the ester formulations of the phenoxy herbicides may volatilize and cause more damage than the amine form.

GROUND SPRAYING

There are few reported ground spraying cases across the U.S. and none in Ohio. In fact, there are no reported Ohio cases for either ground or aerial chemical spraying. Several spray damage controversies have arisen in Ohio, however, they have been settled between the parties out of court.

Ground spraying presents less of a liability problem since the spray drifts less; thus, is not likely to be considered an ultra hazardous activity. It is doubtful that a farmer would be held vicariously liable (liable in place of a custom

applicator) for the negligent acts of a custom applicator or that the standard of strict liability would be applied to cases involving ground spraying.^{7/}

One of the few reported ground spraying cases involved a Texas landowner who sued the owner of an easement, Sun Pipeline, for damages to trees and foliage. The damage was incurred when an independent contractor hired by the pipeline sprayed a chemical defoliant along the fence line which bordered the easement and injured the landowner's property. The court held that the pipeline was not liable for the acts of its independent contractor because the plaintiff-landowner failed to prove negligence. The issue of whether spraying the defoliant with ground equipment constituted an inherently dangerous activity was not raised or proved.^{8/}

It is important to remember that farmers have also lawfully been held responsible for their own improper or careless use of chemicals applied on the ground. In one case, a farmer-landowner scattered grasshopper poison in his alfalfa field that bordered a pasture which he leased to another farmer-tenant. Several of the tenant's cattle died after consuming some of the poison which was later found near the fence that separated the pasture and the alfalfa field. The court indicated that the lessor had a duty to warn his tenant that the chemical was being applied next to the cattle.^{9/}

RECOMMENDATIONS

There are several safeguards which farmers should observe in order to decrease the risk of liability:

- (1) Hire a licensed, experienced custom applicator.
- (2) Insert a written clause into the contract providing for compensation for any damages which the farmer must pay as a result of the applicator's negligence.
- (3) Acquire adequate liability insurance and inform the insurance agent about the risks encountered in the business.

^{5/} Langan v. Valcopters, 567 P. 2d 218 (1977).

^{6/} Sun Pipeline Co. v. Kirkpatrick, 514 S.W. 2d 789 (1974).

^{7/} Hart, Neil.

^{8/} Sun Pipeline Co. v. Kirkpatrick, 514 S.W. 2d 789 (1974).

^{9/} Underhill v. Motes, 146 P. 2d 374 (1944).

- (4) Try to ensure that the custom applicator employs acceptable management practices such as: spraying after the wind has subsided, using the correct type and amount of chemicals, and keeping a safe distance from adjoining fields.
- (5) Notify beekeepers if areas close to hives or where bees feed are to be sprayed with insecticides.
- (6) Talk with neighbors and explain the nature of the chemicals being applied.
- (7) Be sure any employees who spray chemicals are knowledgeable and are skilled in their work.
- (8) If you do your own spraying be sure to exercise all of the needed precautions.
- (9) Always read the label and follow directions.

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